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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 558

WALTER O. LANFRANCONI, *Petitioner*

v.

TIDEWATER OIL COMPANY, *Petitionee*

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Tidewater Oil Company, petitionee in this matter, submits herein its brief in opposition to the granting of a Writ of Certiorari.

I

COMMENTS UPON PETITIONER'S STATEMENT OF CASE

The statement of the case presented by the petitioner on Page 3 is substantially correct with the exception that petitioner's view of the evidence does not take into account that petitionee's agent in this matter admitted that he had lied during the course of negotiations and that his representations were outside the scope of his authority and that where petitioner mentions that the station was turned over on July 1, 1961 "the day after the cancellation became effective" petitioner does not take into account the evidence that the new lease was dated back to July 1, 1961 for the purpose of continuity and that the new owner, in fact, did not commence business until on or after August 15, 1961.

II

COMMENTS UPON PETITIONER'S QUESTIONS

The petitioner has presented three (3) questions on Page 2 of his petition—

QUESTION NUMBER I — contains an erroneous statement wherein he asserts that there was no error of law affecting the award of exemplary damages. You are referred to App. A, which is the report of the decision of the United States Court of Appeals for the Second Circuit, Page 7A, line 7, where the Second Circuit states as follows: "The trial court erred in submitting the question of defamation of plaintiff's character to the jury".

QUESTION NUMBER II — presented on Page 2 has been briefed on Page 6, 7, and 8 of the petitioner's petition and petitionee does not agree with the interpretation set forth by petitioner. The Second Circuit clearly stated that, in its opinion, the award for exemplary damages was "manifestly and grossly excessive".

III

VERMONT LAW CORRECTLY APPLIED

Petitioner quotes the leading case of *Woodhouse v Woodhouse* 99 Vt. 91, which quotation appears on Page 7 of his brief, and on Page 157 of the case. Even a cursory reading of this quotation makes it apparent that the Vermont Supreme Court will interfere with a verdict when it is found excessive and it will interfere when there is an indication that there has been a gross mistake. The Second Circuit has used language from another Vermont case, *Gray v Janicki* 118 Vt. 49, which, along with the Woodhouse case incorporates both the words "gross or grossly" and the word "excessive".

The petitioner quotes again on Page 7 from the Woodhouse case, Page 160 in an attempt to interpret the law of Vermont that an appellate court will not interfere with a verdict unless abuse of discretion is shown.

The petitionee contends that this statement of law only applies to the decision of a motion to set aside the verdict. The Second Circuit did not set aside a verdict—it only merely affirmed the verdict upon condition.

IV

NO CONFLICT AMONG CIRCUIT COURTS

AS ANOTHER REASON WHY PETITIONER'S WRIT SHOULD BE GRANTED — petitioner advances that there is a serious conflict among the various circuit courts concerning the order of a remittitur.

Petitioner briefs this proposition on Pages 4, 5, and 6 and relies entirely upon language of the Eighth Circuit. The Eighth Circuit has clearly set the record straight that there is no conflict among circuits as set forth in the quotations supplied by petitioner in the case *Solomon Dehydrating Co. v. Guyton* 294 F2d 439 at 447-448, with regard to the ordering of a remittitur. "Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others".

V

POWER TO ORDER REMITTITUR

Petitioner advances that there are important questions of federal law involved when a remittitur is ordered and that the ordering of a remittitur by itself becomes a usurpation of the function of the jury.

The Second Circuit was very careful in its decision to justify the power to order remittitur, Pages 8A, 9A, and 10A of the decision in the Appendix. The petitionee agrees with the analysis presented by the Second Circuit on Pages 8A, 9A, and 10A of petitioner's appendix.

VI

COMMENTS UPON PETITIONER'S REQUEST FOR ANSWER TO QUESTIONS

Petitioner asks this Honorable Court to answer (5) questions. In the event the court would seriously intend to make answer as requested, the petitionee takes this opportunity to correct some inaccuraciies set forth in the questions.

QUESTION NUMBER I — the transcript and the decision of the Second Circuit make it clear and evident that the compensatory damages were not, cannot, and could not be supported by the evidence.

QUESTION NUMBER II — The Second Circuit has already found that the trial court was in error in submitting the issue of defamation which will certainly have bearing on the exemplary damages awarded.

QUESTION NUMBER III — The Second Circuit found that the trial court erred in instructing the jury that it could award separate damages for loss of good will and again erred in submitting the question of defamation of plaintiff's character to the jury, App. 7A of petition.

QUESTIONS IV and V — There is certainly less reason to impose standards upon a court of appeals than there is to impose standards upon a jury.

It should be made adequately clear to the petitioner that judgment was entered on the verdict of the jury and that this judgment was affirmed by the Second Circuit upon condition, which affirmance clearly set forth "should plaintiff not accept this condition within thirty (30) days from the filing of this opinion, the judgment of the District Court is reversed and the cause remanded for a new trial. App. 4A, and should plaintiff be dissatisfied with this total verdict of $12,500, he is, of course, free to seek a new trial".

VII

CONCLUSION

This Honorable Court has promulgated in Rule 19—reasons when it will review on Writ of Certiorari and will grant such a

review—"when there are special and important reasons". One of the reasons is when there is a conflict among Circuit Courts in decisions of important state questions or when a decision conflicts with applicable state law.

Both the petitioner's and the petitionee's brief clearly indicate that there is no such conflict in the decision of the Second Circuit Court. The only other reason would be that if the Second Circuit had so far departed from the accepted and unusual course of judicial proceedings or so far sanctioned such a departure as to call for this Court's power of supervision.

The petitioner contends that there is no such departure in this case since the ordering of a remittitur has been and is not unusual in Federal or State Courts in this country. Accordingly, the petition for a Writ of Certiorari should be denied.

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